LIBRARY
SUPREME COURT, U. S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-256

NICHOLAS JOSEPH PARRA,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

ALAN SALTZMAN and
MARTHA GOLDIN
6430 Sunset Blvd.
Suite 521
Hollywood, Cal. 90028
[213] 461-3464

Attorneys for
Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO._____

NICHOLAS JOSEPH PARRA,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

ALAN SALTZMAN and
MARTHA GOLDIN
6430 Sunset Blvd.
Suite 521
Hollywood, Cal. 90028
[213] 461-3464

Attorneys for
Petitioner

TOPICAL INDEX

	Page
Table of Authorities	ii
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	24
APPENDIX A	
OPINION OF THE COURT OF APPEAL	
APPENDIX B	
ORDER DENYING HEARING AFTER JUDGMENT BY COURT OF APPEAL	
APPENDIX C	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	

TABLE OF AUTHORITIES

Cases	Page
Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4 (1925)	13
Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967)	11, 12, 15
Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970)	13
Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776 (1961)	17
Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969)	11, 12, 13, 23
Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U.S. 380, 22 S.Ct. 811 (1902)	16
Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971)	12, 14, 20
Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S.Ct. 358 (1905)	16

Cases	Page
Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367 (1948)	17
Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967)	20
Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961)	12
North American Cold Storage Co. v. City of Chicago, 211 U.S. 306, 29 S.Ct. 101 (1908)	16
Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964)	14
Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966)	17
See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967)	12, 15
Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889 (1968)	18
Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)	18, 21, 22

Cases	Page
United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93 (1951)	17
Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969 (1970)	13, 17, 20
Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967)	17
Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949)	11

CONSTITUTION

United States Constitution	
Fourth Amendment	3, 4, 7, 10, 11, 12, 13, 14, 15, 20, 21, 22, 23
Fourteenth Amendment	3, 4, 7, 11, 15

STATUTES

California Penal Code	
§995	4, 8
§1538.5	4, 8
§1538.5(m)	9
Health and Safety Code	
§11500.5	4, 8

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO._____

NICHOLAS JOSEPH PARRA,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

Petitioner, NICHOLAS JOSEPH PARRA, prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District,

Second Division, entered in this proceeding on February 21, 1973.

OPINION BELOW

The opinion of the court below is reported at 30 Cal.App.3d 729, 106 Cal. Rptr. 531. A copy of the opinion is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Second Division, (Appendix "A") was filed and entered February 21, 1973. A timely Petition for Hearing in the Supreme Court of the State of California was denied on May 9, 1973, without opinion. A copy of the order denying hearing is attached hereto as Appendix "B". The Court of Appeal, therefore, became the highest court in the State of California in which a decision could

be had.

QUESTIONS PRESENTED

1. Whether a warrantless entry made into a private shop not open for business, solely in order to search for the name and address of the shopkeeper is unreasonable and prohibited by the Fourth and Fourteenth Amendments guarantees of right to privacy and freedom from unreasonable searches and seizures.

2. Whether the Fourth and Fourteenth Amendments to the Constitution require suppression of evidence seized in a warrantless, rummaging and ransacking search of the contents of a desk located inside a private business establishment, which search was conducted solely to ascertain the name and address of the shopowner.

3. Whether a warrantless, rummaging

and ransacking search of the contents of a desk located inside a private business establishment, which search was conducted solely to ascertain the name and address of the shopowner may be justified on the grounds of "exigent circumstances" where it is clear that there are available several reasonable alternatives to the search.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourth and Fourteenth Amendments to the United States Constitution, and the pertinent provisions of California Penal Code §§995 and 1538.5 and Health and Safety Code §11500.5 are set forth as Appendix "C" attached hereto.

STATEMENT OF THE CASE

A. At all times relevant herein

Petitioner conducted a florist business in a store located in a shopping center in Colton, California. About 6:00 p.m. on the evening of September 27, 1971, the police were called and told that the store was apparently closed but the front door was unlocked. An officer checked and saw that the shop door was ajar, although the store was dark and not open for business. The door could be locked only with a key.

He went in. The store was partitioned, the front appearing to be the portion open to the public, the rear appearing to be the private business area. With the aid of a flashlight, the officer looked around. There was no one in the store; it was totally undisturbed. He thoroughly examined both the front and rear portions for the name and address or telephone

number of the shopowner, but found nothing. He went to his car, which was parked immediately in front of the store, and by use of his radio, notified the police station that he could not find the name of a responsible party. A second police officer arrived and the two men went back into the shop. They turned on the lights and looked again, but again did not locate the identity of the owner. The officers proceeded with their search.

There was a desk in the rear, private portion of the store. The police rummaged around the top of the desk, but found nothing. They then pulled open the center drawer of the desk and there found three prophylactics filled with some substance, and tied shut. (It was later determined that the prophylactics contained heroin). The

police continued their search until sometime later, when Petitioner arrived. In response to their inquiry, he identified himself as the shopowner. Petitioner was then arrested and charged with possession of heroin for sale.

B. A preliminary hearing was conducted in the Municipal Court at which Petitioner sought to suppress the evidence because it had been illegally seized in violation of his right of privacy and his right to be free from unreasonable searches and seizures, all guaranteed by the Fourth and Fourteenth Amendments to the Constitution, in the aforementioned warrantless search of his shop. His motion was denied and Petitioner was held to answer.

An information charging Petitioner with possession for sale of heroin in

violation of California Health and Safety Code §11500.5 was filed in the Superior Court. Petitioner made a motion pursuant to California Penal Code §995 to dismiss the information on the grounds that it was not founded on reasonable or probable cause and that it was based on the aforementioned incompetent evidence seized in violation of his aforementioned constitutional rights. This motion was denied. Petitioner then made a motion pursuant to California Penal Code §1538.5 to suppress the aforementioned illegally obtained evidence on the same grounds of constitutional infirmity. This motion was also denied. Petitioner then entered a plea of guilty to the charge and was sentenced to state prison for the term prescribed by law (five to fifteen years).

In accordance with the procedure authorized by California Penal Code

§1538.5(m), Petitioner appealed to the Court of Appeal from the judgment of conviction entered on his guilty plea. His appeal sought to review, on constitutional grounds, the validity of the search and seizure which resulted in the evidence essential to establish his guilt. The Court of Appeal, one judge dissenting, brushed aside his constitutional arguments, holding that the police entry into Petitioner's florist shop did not violate his right of privacy because it was necessary in order to protect the shop and its contents. The court further held that the subsequent search of the desk conducted after it was absolutely plain that neither life nor property had been harmed or disturbed, was justified because of the "exigent circumstance" that the identity of the owner had to be discovered in order to

secure the shop.

The dissenting judge, assuming that necessity justified entry into the shop, said of the purported "exigency" that other alternative means of safeguarding the premises were available: "The officers could have wedged the front door shut, called a locksmith, or paid special attention to the premises during patrol." (Appendix "A", p.14). In short, it was made absolutely clear that the invasion of Petitioner's rights under the Fourth Amendment could have been preserved in a manner entirely consistent with the duty of the police to protect life and property.

A timely Petition for Hearing in the California Supreme Court again raising the federal constitutional questions was denied and this Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

The court below has decided federal questions of substance not heretofore determined by this Court, and decided the federal questions in a way not in accord with applicable decisions of this Court.

1. The Fourth Amendment stricture against unreasonable searches and seizures has as its basic purpose the safeguarding of individual privacy and security from governmental intrusion. Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967). It expresses a purpose "basic to a free society" Wolf v. Colorado, 338 U.S. 25, 27, 69 S.Ct. 1359 (1949). Hence, its guarantees are enforceable against the states through the due process clause of the Fourteenth Amendment. Chimel v. California, 395 U.S. 752,

89 S.Ct. 2034 (1969); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961).

Though the fundamental purpose of the Fourth Amendment is clear, the precise limits of "unreasonable" government conduct are not always apparent. However, this Court has recognized that except within narrowly defined situations, a warrantless, uninvited intrusion into an individual's home or business is unreasonable. See, e.g., See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967); Camara v. Municipal Court, supra.

The states may not carve exceptions out of the general rule that a warrantless search is unreasonable which are inconsistent with the fundamental constitutional guarantees. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971); Chimel v. California, supra. Thus, while a properly limited search of

a dwelling incident to a lawful arrest may be constitutional (Chimel v. California, supra), it is well settled that a warrantless search not incident to a lawful arrest, though based upon probable cause, violates the Fourth Amendment:

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant." Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 6 (1925).

See also Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969 (1970). And, while a warrantless search of an automobile may, under some circumstances, be valid (Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 [1970]), it is repugnant to the Constitution where it is reasonable for the police to obtain a warrant.

Coolidge v. New Hampshire, supra; Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964).

In light of the foregoing fundamental principles sharply limiting the class of cases in which a warrantless search may be deemed reasonable within the meaning of the Fourth Amendment, was it permissible for the police to enter and search Petitioner's store with neither consent nor a warrant, merely to satisfy their curiosity about the condition of the premises and ownership of the store? A majority of the court below, disregarding the constitutionality mandated rule that even probable cause for a search does not excuse the need for a warrant, answered the foregoing question, "Yes." Its decision conflicts with the decisions of this Court and permits a hitherto unknown deprivation of rights of privacy and

security guaranteed by the Fourth and Fourteenth Amendments to the Constitution. It implicates a frequent and recurring problem of the balance between individual rights and police duty and hence raises an important question which should be decided by this Court.

2. The Fourth Amendment protects the non-criminal from official warrantless intrusion into his privacy as much as it does the criminal. Camara v. Municipal Court, supra. And the public interest, while it may require searches, does not necessarily demand warrantless searches. See v. City of Seattle, supra; Camara v. Municipal Court, supra. Hence, in Camara and See, this Court held that a warrantless, routine inspection to enforce building, safety and fire codes was contrary to Fourth Amendment guarantees.

It recognized the necessity for such inspections, but noted that neither the laudable motive of protecting life and property nor the fact that the inspections were not for purposes of uncovering crime justified a warrantless search.

At the same time this Court referred to the possibility that an individual's right to be free from a warrantless search constitutionally might be compelled to give way in an emergency. North American Cold Storage Co. v. City of Chicago, 211 U.S. 306, 29 S.Ct. 101 (1908) (seizure of unwholesome food); Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S.Ct. 358 (1905) (compulsory smallpox vaccination); Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U.S. 380, 22 S.Ct. 811 (1902) (health quarantine). And, in

other cases this Court has mentioned the "emergency" doctrine as one which could excuse the need to obtain a search warrant. See, e.g., Vale v. Louisiana, supra; Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967) (hot pursuit); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966) (destruction of evidence); Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776 (1961); United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93 (1951); Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367 (1948).

But apart from the cases in which warrantless searches have been upheld because a car with its high mobility was involved, or because evidence might otherwise be dissipated, no decision of this Court has held that particular exigencies will justify a warrantless search of a business or home not incident to an arrest.

And no decision appears to have applied the concept of exigency to a case where there was no probable cause, or at least reason to believe that some kind of protective search was necessary. Cf., Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889 (1968).

The court below justified the entry into Petitioner's shop upon the theory that "An unlocked door to a retail establishment after business hours [leads] to the logical conclusion that the circumstance was a threat both to the private and public interests involved." (Appendix "A", p.7). The search itself was justified on the basis that the police could not solve the problem by merely locking the door and leaving. This required a search for the identity of the proprietor who could himself then provide

for the security of the shop.

Was this the type of emergency to which this Court has alluded as authorizing a warrantless search? Isn't an individual's right of privacy and security violated when the police come into his closed store not to apprehend a criminal, reasonably believed to have entered the store; not to halt in midstream a crime reasonably thought to be taking place inside; not even to prevent the destruction of evidence of a crime; but merely to look around and locate the identity of the shopowner? The question is a substantial and recurrent one, implicating the balance between the police duty to protect life and property and the individual's right of privacy and security in his own business. It has never been decided by this Court and requires resolution in this case.

3. Assuming, arguendo, that the initial entry of the police into Petitioner's store, in order to ascertain whether all was well, was not in violation of the Fourth Amendment, could the subsequent general search be justified because of "exigent circumstances"? The exigent circumstances doctrine is an exception to the general rule requiring a warrant. This Court has never accepted it where the obtaining of a warrant was merely inconvenient. See, e.g., Coolidge v. New Hampshire, supra; Vale v. Louisiana, supra. Cf., Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967). This Court has applied the "emergency" doctrine exception only where probable cause existed and the imminent dissipation of evidence justified the immediate warrantless intrusion.

Can the "exigent circumstances"

doctrine survive the mandate of the Fourth Amendment where there is no probable cause and where there are reasonable alternatives available? Terry v. Ohio, supra, implies that probable cause may not always be the appropriate criteria (although it does demand specific facts to justify governmental interference with individual liberty). But what of the fact that alternatives are available? The majority of the court below considered only the desirability of finding the shopowner in order to secure the store. This it held, necessitated and justified the search. The dissent pointed to three reasonable alternatives, any of which would have dissipated the supposed emergency and necessity: The police could have wedged the door shut; they could have called a locksmith; or they could merely have paid special attention to the premises during patrol.

Whether exigent circumstances such as justify a warrantless invasion of privacy and security can exist where there are reasonable alternatives is a substantial, frequent and recurring question which this Court should answer in order to strike the appropriate balance between the protection of private rights and the duty of the police to care for the safety of the public.

4. In Terry v. Ohio, supra, this Court held that a limited intrusion upon an individual did not violate the dictates of the Fourth Amendment although there was no probable cause for arrest, because there was a reasonable basis for a protective search. This Court emphasized that the necessity for even that limited intrusion must clearly be present and that the search which something less than

probable cause justified must be extremely narrow in scope. In Petitioner's case the police first entered the store and ascertained that no robbery was in progress and nothing appeared disturbed. Assuming, arguendo, that that "limited" search did not deprive Petitioner of his rights guaranteed by the Fourth Amendment, wasn't the second investigation of his store and the search of his closed desk drawer beyond the scope of any warrantless search based upon any doctrine of necessity so far developed by this Court? See, e.g., Chimel v. California, supra. Does the necessity to find the owner of a store in order to lock it justify a search of the entire premises, including closed and private places? This significant question regarding the permissible scope of a warrantless search conducted for reasons of police convenience should be answered by this

Court in this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District, Second Division.

Respectfully submitted,

ALAN SALTZMAN and
MARTHA GOLDIN

By: MARTHA GOLDIN

Attorneys for Petitioner

CERTIFIED FOR PUBLICATION
COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

COURT OF APPEAL-FOURTH DIST.
FILED
FEB 21 1973
JOHN R. McCOWELL, Clerk
Deputy Clerk

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

NICHOLAS JOSEPH PARRA,

Defendant and Appellant.

4 Crim. 5530

(Sup.Ct.No.Cr-25423)

O P I N I O N

APPEAL from a judgment of the Superior Court of San Bernardino County. John P. Knauf, Judge. Affirmed.

Fred A. Lopez, Jr. and Jesse Arias, Jr. for Defendant and Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, William E. James, Assistant Attorney General, and Mark L. Christiansen and Yvonne H. Behart, Deputy Attorneys General, for Plaintiff and Respondent.

Judgment of conviction was entered on a plea of guilty made by defendant Nicholas Joseph Parra to the charge of possession of heroin for sale. (Health & Saf. Code, §11500.5.) Defendant unsuccessfully moved the trial court to suppress certain evidence essential to establish his guilt. By this appeal, he seeks further review of the validity of the search

APPENDIX "A"

and seizure. (Pen.Code, §1538.5, subd. (m).)

At nightfall on Sunday evening, September 27, 1970, police officer Michael Robitzer arrived at a shopping center in Colton in response to a citizen's report that the front door of the Alpar Florist Shop was open. Although a sign on the door announced "Sorry, We Are Closed," Robitzer saw that the door was ajar. The door was made of glass, with a metal frame and push bar, and was hinged to swing both in and out. The lock on the door was of a kind that could be worked only by its key.

Robitzer checked the door and the front window for the name of the proprietor but found none. He then stepped inside the shop and with the aid of his flashlight looked around for the same information, without success. The city business license read only "Alpar Florist." A radio check with the police dispatcher also failed to produce from police records any name or telephone number of the party responsible for the business premises. Robitzer explained the reason for his investigation as follows: "Well, the fact that the door was left open and the building could be entered, the reason we have to have responsible person come down is to check to see if anything is missing, to see if a crime is committed and to secure his building and make sure everything was to his satisfaction before leaving."

Robitzer, a new man on the force, called the shift supervisor for assistance and shortly thereafter Sergeant Paul Connally appeared. The two reentered the shop. Connally explained the purpose for entering the premises as follows: "Our purpose would be to attempt to secure the store for the owner of the business as best we could, contact him and find out if anything, everything was all right, if anything had been taken, anything disturbed."

The officers passed through a partition to the rear portion of the shop. Connally found a light switch and turned on the lights. A kneehole-type desk was near the light switch. An examination of the clutter on the top of the desk yielded no information as to the proprietor of the shop. Connally said, "I thought that quite possibly there would be a business card in the desk and so I opened the large drawer in the center of the desk, the one right under the top of the desk." Upon opening the drawer six or eight inches, Connally saw three translucent prophylactic sheaths, one and one-half inch to two inches in diameter and three or four inches long, tied off at the ends and containing a powdery substance. Connally knew that narcotics are packaged in this way. His knowledge was derived from a class in vice and narcotics control at California State College Los Angeles, departmental schools conducted by the narcotics division, and "training boards with narcotics paraphernalia and substances on them." He had

made arrests for narcotics offenses and was familiar with how heroin was packaged for use on the streets.

Connally untied the end of the prophylactic and saw the "brownish powdery grainy substance" inside. He said that he "had a stronger suspicion at this time that it was, in fact, a narcotic," founded upon "previously seen narcotic heroin substance." Connally put in a call for the department's narcotics officers who subsequently arrived and confirmed that the substance was heroin.

Further search of the top desk drawer revealed more balloons and prophylactics, one of the latter containing "some type of substance inside."

The other drawers of the desk were opened. There and in other parts of the room more balloons and some teaspoons were found but no narcotics were found.

Defendant appeared at the shop about 10 p.m. Robitzer asked defendant if he was the owner of the shop and when defendant said, "Yes," he was placed under arrest. After being advised of his rights, defendant was asked whether the suspected heroin was his. Defendant admitted it was his, that it was heroin, that he got it from Mexico, and that he was dealing in narcotics and had been dealing "since March." When defendant was asked how much heroin there was he said, "Three balloons that are uncut, I cut three to one." Defendant said that he paid $2,500 for the heroin, and that

he received a supply every month or month and a half from which he made $7,500.

Defendant consented to a search of his car in the trunk of which was found a balloon with "some type of substance inside."

The brown powder found in the desk and the automobile was chemically analyzed as 5.2 ounces of heroin.

The first question is whether it was lawful for the officers to enter the shop.

There is nothing in the record to suggest that the officers entered the retail business establishment for any purpose other than to provide for its security. To paraphrase section 197 of the Restatement of Torts (2d ed.), one is privileged to enter and remain on land in the possession of another if it reasonably appears to be necessary to prevent serious harm to the land or chattels of the other party, unless the actor has reason to know that the one for whose benefit he enters is unwilling that he shall take such action. Section 197 is cited by the Supreme Court in People v. Roberts, 47 Cal.2d 374, 377, wherein the court recognizes the privilege of police officers to enter private premises to preserve life or property: "Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose."

According to the uncontradicted and credible evidence before the trial court, the officers entered the Alpar Florist Shop to protect the shop and its contents. Their presence in the shop was privileged.

Two recent Supreme Court cases relied on by defendant, People v. Smith, 7 Cal.3d 282, and Horack v. Superior Court, 3 Cal.3d 720, are inapposite since both involved police intrusions into locked residential premises which were unlawful in their inception.

Concerning Smith, a police officer responded to a landlord's report that the tenant of an upstairs flat had left unsupervised a six-year-old girl. The officer talked to the child, and then directed the landlord to unlock the door to the upstairs flat, ostensibly to ascertain whether the child's mother had returned home in the interim. The trial court had found the evidence insufficient to establish the existence of an imminent and substantial threat to life, health or property, and suppressed the evidence uncovered during the officer's entry. The Supreme Court could perceive no valid justification for reweighing the factual basis of this determination and affirmed the order of the trial court. (7 Cal.3d at pp. 286-287.)

As to Horack, police officers were conducting a noontime investigation of a report that two "hippie type" individuals had been seen entering what was believed to be a vacant residence. When there was no answer to the knock at the locked

front door, the officers entered the house, guns drawn, through an unlocked rear door and proceeded to conduct a room-by-room and closet-by-closet search, which revealed a quantity of contraband. The People contended that the entry and search was authorized by the general duty of the police to investigate, detect and prevent crime and to protect life and property. The Supreme Court held, among other things, that, on the facts, emergency circumstances giving rise to an entrance under compulsion of necessity were simply not present. (3 Cal.3d at p. 725.)

The Supreme Court considered that in both Smith and Horack the belief upon which the officers acted was not the product of facts known to or observed by them but of "a fanciful attempt to rationalize" a justification for warrantless entry. (People v. Smith, supra, 7 Cal. 3d at p. 287.) In this case, unlike Horack, the officers were not engaged in tracking down criminals or evidence of crime, and unlike both Horack and Smith, the officers' reaction in entering the shop was not predicated upon abstractions or speculation but upon the observed fact of an unlocked door to a retail establishment after business hours, leading to the logical conclusion that the circumstance was a threat both to the private and public interests involved.

The next question is whether it was lawful for the

officers to open the desk drawer.

According to the facts, the police were unable to solve the problem by merely locking the door and departing. The next move indicated by the circumstances was to communicate the difficulty to the proprietor who could himself then provide for the security of the shop and its contents. This move was frustrated by the absence of any identification of the proprietor displayed in the shop or recorded in the police department's index. At this point the officers were confronted with three alternatives: one, they could place a guard in the shop, at the expense of police service otherwise available to the community; or, two, they could leave the unlocked shop unguarded and resume patrol; or, three, they could continue efforts to identify and locate the proprietor. To avoid the dilemmas implicit in the first two alternatives, the officers elected the third alternative. Having exhausted the first obvious sources of information, they looked for identification of the proprietor in the next logical place, namely, the top drawer of the desk. The legal issue is whether this conduct offended the Fourth Amendment of the United States Constitution which commands that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.

The protection of the constitution against unreasonable searches and seizures extends to business premises: there is

no formula for the determination of reasonableness and each case must be decided on its own facts and circumstances. (Go-Bart Importing Co. v. United States, 282 U.S. 344 [75 L.Ed 374, 51 S.Ct. 153].)

In a situation analogous to the within case, the Supreme Court has recognized that official reaction to exigent circumstances is equal to the emergency which attracted concern in the first place. (People v. Lanthier, 5 Cal.3d 751.) In Lanthier, a supervisor of university maintenance and security received a complaint of a noxious odor emanating from somewhere in a study hall. Using a master key, he opened each student locker in the hall until, in a locker used by the defendant, he found a briefcase from which the odor was emanating. The official opened the briefcase and saw, in transparent plastic wrapping, material which he suspected might be marijuana. The briefcase was turned over to university police who contacted the sheriff's department. A deputy sheriff identified the material as contraband.

At the preliminary examination, the magistrate found that the official was not looking for contraband or illicit or stolen property or any evidence of guilt of any crime or other offense; that the search was not unreasonable; and that it did not become unreasonable even when the official opened the briefcase. The Supreme Court agreed, holding that the People sustained the burden of showing justification

for the warrantless search by a showing of facts bringing the search within the emergency exception, that is, that a compelling urgency was clearly shown making reasonable a prompt inspection of the premises. (5 Cal.3d at pp. 755-756.) The court also held that once the briefcase was discovered and opened, its contents were in plain sight, and that an observation from a lawful vantage point of contraband in plain sight is not a search in the constitutional sense.

Here, as in Lanthier, the search was not undertaken to seek out evidence of crime. Two distinctions can be made between this case and Lanthier. In Lanthier, the inspection was conducted for the purpose of abating a nuisance. This case involved an emergency presented by the discovery of an unlocked business premise, a situation which, if not a nuisance, nevertheless constituted an invitation to criminality --a condition certainly not less hurtful to the community than the existence of a bad smell. In Lanthier, it was a university official who first inadvertently uncovered the contraband in the course of solving the practical problem presented by the exigent event. In this case it was a police officer who stumbled upon the narcotics. But the court in Lanthier expressly declined to base its decision on this distinction. Rather, it placed its holding squarely on Fourth Amendment principles. (5 Cal.3d at p. 755.)

Appellant does not argue that discovery of the translucent condoms containing a powdery substance and tied off at the ends was other than a "plain sight" of contraband, identical in effect to the discovery in Lanthier of "Baggies" containing a green leafy substance; nor would such an argument be meritorious (cf. People v. Berutko, 71 Cal.2d 84, 90-91).

Finally, consistent with the principle that the scope of a search must be strictly limited to the circumstances which rendered its initiation permissible (Terry v. State of Ohio, 392 U.S. 1, 19 [20 L.Ed.2d 889, 88 S.Ct. 1868, 1878]; Gilbert v. California, 388 U.S. 263, 274-275 [18 L.Ed.2d 1178, 1187-1188, 87 S.Ct. 1951, 1957]; People v. Marshall, 69 Cal.2d 51, 59-60), it is noted that the items found elsewhere in the desk and in the shop subsequent to discovery of the contraband are the unlawful product of a general, unprivileged police search. However, appellant does not raise the point, which can be taken as a concession that the evidence of the first-seen contraband, which by itself would have supported a conviction, was the efficient cause of appellant's guilty plea.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

KAUFMAN
J.

I concur:

ABBERT
J.

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

COURT OF APPEAL-FOURTH DIST.
FILED
FEB 2 1 1973
JOHN R. McDOWELL, Clerk
Deputy Clerk

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

NICHOLAS JOSEPH PARRA,
Defendant and Appellant.

4 Crim. 5530

(Sup.Ct.No.CR-25423)

DISSENTING OPINION

I respectfully dissent.

Assuming that necessity justified entry into the shop to determine whether a burglary was in progress or had been committed (but see Horack v. Superior Court, 3 Cal.3d 720), once the officers checked the premises out and found no unauthorized persons present or evidence of a burglary having been committed, there no longer existed an immediate threat to life, health or property which justified rummaging through the owner's desk drawer however laudable the officers' motives may have been.

The "necessity" upon which the majority seek to justify the search of the desk was no more imminent than the necessity arising out of the quandary faced by the

officers in People v. Smith, 7 Cal.3d 282, as to what to do with the child who had been left alone in her apartment. In Smith the court commended the officers for their solicitude for the child's safety and welfare but pointed out that the issue was "not simply whether the conduct of Officer Brown might have been 'reasonable' under all the circumstances, but whether the People have shown that his entry into Mrs. Blim's home falls within one of the 'few specifically established and well-delineated exceptions' to the warrant requirement. [Citations.]" (7 Cal.3d at 286.) The court held that the "necessity" or "emergency doctrine" "must not be permitted to swallow the rule: in the absence of a showing of true necessity -- that is, an imminent and substantial threat to life, health, or property -- the constitutionally guaranteed right to privacy must prevail." (Emphasis supplied.) (7 Cal.3d at 286.)

People v. Lanthier, 5 Cal.3d 751, is clearly distinguishable. There the noxious odor emanating from the locker constituted a nuisance; it posed a present and imminent threat to the health, safety and welfare of the students. An unlocked business premises, however, without more, does not pose such an imminent threat to life, health or property. The majority poses a threat which was possible but not one which was imminent.

Under the majority holding, if the police were unable to find evidence of the proprietor's identity in the first desk drawer, presumably they could continue to look through the remaining drawers and perhaps even rummage through file cabinets or other personal effects in order to find evidence of such identity. The mere fact of an unlocked business premises cannot be used to justify such a serious and extensive intrusion into a citizen's Fourth Amendment right of privacy. Other alternative means of safeguarding the premises were apparently not considered. The officers could have wedged the front door shut, called a locksmith, or paid special attention to the premises during patrol.

I would hold the search unlawful under People v. Smith, supra, 7 Cal.3d 282, and Horack v. Superior Court, supra, 3 Cal.3d 720, and reverse the judgment.

CERTIFIED FOR PUBLICATION.

/s/ Tamura
Acting P.J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 9 1973

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 4 Crim. *No.* 5530

People

vs.

Parra

Respectfully,

G. E. BISHEL
Clerk

67783-677 10-72 5M OSP

EXHIBIT "B"

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. The provisions of the Fourth Amendment are:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The provisions of the Fourteenth Amendment, Due Process clause:

"***nor shall any State deprive any person of life, liberty, or property, without due process of law;***"

3. The pertinent provisions of

§995 of the California Penal Code are:

"The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases: ...If it be an information: ...That the defendant had been committed without reasonable or probable cause."

4. The pertinent provisions of §1538.5 of the California Penal Code are:

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on * * either of the following grounds:

"(1) The search or seizure without a warrant was unreasonable * * *

"(i) If the property or evidence obtained relates to a felony offense

initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed

within 30 days after the denial of his motion at the special hearing." ....

"(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction

he has moved for the return of property or the suppression of evidence."

5. The pertinent provisions of §11500.5 of the Health and Safety Code are:

"Except as otherwise provided in this division every person who possesses for sale any narcotic other than marijuana shall be punished by imprisonment in the state prison for not less than five years nor more than 15 years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 2 1/2 years in prison."

SUPREME COURT, U. S.
FILED
NOV 26 1973
JR., CLERK

In The Supreme Court of The United States

October Term 1973

NO. 73-256

NICHOLAS JOSEPH PARRA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE
OF CALIFORNIA
FOURTH APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

EVELLE J. YOUNGER,
Attorney General
EDWARD A. HINZ, JR., Chief
Assistant Attorney
General --
Criminal Division
DORIS H. MAIER,
Assistant Attorney
General --
Writs Section
A. WELLS PETERSEN,
Deputy Attorney General
YVONNE H. BEHART,
Deputy Attorney General
1350 Front Street, Room 5006
San Diego, California 92101
Telephone: (714) 236-7351

Attorneys for Appellant